Supreme Court, U.S.
FILED
JAN 28 1997
CLERK

No. 96-947

IN THE

Supreme Court of the United States

October Term, 1996

JODY H. DERAMUS, Individually and as Administratrix of the Estate of Frank Deramus,

Petitioner,

v.

JACKSON NATIONAL LIFE INSURANCE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION

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REPLY BRIEF SUPPORTING PETITION

Petitioner Jody Deramus respectfully submits this brief in reply to Respondent's Brief in Opposition ("Opp."), filed on behalf of Jackson National Life Insurance Company. The State of Mississippi has filed a brief as *amicus curiae* supporting the petition ("Mississippi Amicus Br."), as did the State of Texas and several other states.

1. There is no jurisdictional bar to accepting this case for review. Respondent argues that jurisdiction here is lacking because certification to the state Supreme Court was not requested below. (Opp. 2). That is simply incorrect as a matter of law. 28 U.S.C. § 1254(1) grants the Supreme Court broad jurisdiction to hear any case from a federal court of appeals on writ of certiorari, and there are no statutory restrictions on the exercise of discretion under that grant.

Generally, of course, questions presented in this Court should be raised and considered below. But this rule is prudential, not jurisdictional; there are numerous situations where the Supreme Court has exercised its discretion to address and decide matters not raised by any party in the courts below. See, *e.g.*, *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980)("important, recurring issues" of relationship between *Bivens* and FTCA remedies addressed to serve "the interests of judicial administration"); *Andrus v. Charleston Stone Products Co.*, 436 U.S. 604, 607 n.6 (1978)(subject matter jurisdiction always open to review by the Court *sua sponte*, even if not raised below); *Youakim v. Miller*, 425 U.S. 231 (1976)(decision vacated, case remanded to consider conflict between state and federal statutes under Supremacy Clause theory not previously advanced); *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1940)(plain error may be corrected although not raised on appeal). Even the vitally important holding in *Erie*

R. Co. v. Tompkins, 304 U.S. 64 (1938), overruling *Swift v. Tyson*, 16 Pet. 1 (1842), was never suggested by the parties, and had not been urged or considered in the court of appeals. Other examples, directly on point, include cases such as *Clay v. Sun Insurance Office, Ltd.*, 363 U.S. 207 (1960), and *Elkins v. Moreno*, 435 U.S. 647 (1978), where the Supreme Court *sua sponte* certified issues to state courts without that procedure having been requested in the court of appeals.

2. The Fifth Circuit's decision of an important issue of Mississippi law by "*Erie*-guess", instead of certifying it to the state's Supreme Court, is appropriate for review. Typically, certification of state law issues will be ordered by a federal court on its own motion, as numerous cases cited in the Petition demonstrate. That is because a court "is in the best position to determine whether it feels confident in its reading of state law." 17A Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 4248, 176 (2d ed. 1988). There are understandable reasons why a party may not seek to invoke the process, such as counsel's lack of familiarity with it, fear of offending the court by asking, or expectation that the court will order it *sua sponte* if needed. Counsel, as advocate for a party, may be genuinely convinced that state law is perfectly clear and in the client's favor, without perceiving the problems the court will encounter in trying to reach a balanced and correct prediction. The mere fact that a party did not urge certification therefore should not be deemed a waiver or procedural bar to contending that it should have been used in preference to an "*Erie*-guess".

Certification, in any event, cannot fairly be viewed as a "claim" of a party which is subject to waiver. Rather, the procedure is properly understood as a means of judicial

decision-making that should be used, as a prudential matter, whenever necessary to reach the correct legal result and to accommodate state interests, whether the parties ask for it or not. That is because, in finding the law, a federal court of appeals has an affirmative duty to get it right — even when the parties fail to make the right arguments or to cite the relevant precedent. As the *amici* have pointed out:

> A federal court hearing private civil litigation should not await an affirmative request by one of the parties before certifying an issue to state court, as the state and public interests at stake — including the state's interest in having its own courts decide important matters of state law — often far transcend the interests of any particular party.

Brief of the State of Texas, et al., as Amici Curiae Supporting Petitioner, 4.

Thus in *Elder v. Holloway*, 510 U.S. ___, 127 L.Ed. 2d 344, 348 (1994), a § 1983 civil rights suit against state police officers which was dismissed on grounds of qualified immunity, this Court in reversing the Ninth Circuit made clear that the court of appeals has an obligation to apply "all relevant precedents" regardless of whether they have been presented or considered below. This is especially true in suits involving vital interests and important public policies of states whose law is being interpreted by the federal court.

3. **Petitioner has not improperly "switched horses" in this case**. Respondent argues that Petitioner should be barred from being heard here because she contended below that Mississippi law "was clear and...unequivocally in her favor." (Opp. 26-27). While her attorneys in the district court

and the court of appeals did express that view, both courts ruled to the contrary. The courts' ruling that Mississippi law was ***not*** settled thereby became the law of the case, binding on both parties. There is nothing strange or inconsistent in Petitioner's acceptance of that judicial determination but also contending that certification was the appropriate procedure, rather than the "*Erie* guess" to resolve the state law issues.

4. **Respondent repeatedly misstates Petitioner's position on certification**. For example, Petitioner has never suggested that the certification procedure should be "universally extended" to all cases involving state law issues or to cases where state law is not uncertain; nor would Petitioner want it used "to burden the Mississippi Supreme Court with repetitive questions" where controlling precedent exists. (Opp. 18, 21). The great bulk of cases handled by the federal judiciary under state law — such as note collection and personal injury actions between parties of diverse citizenship — involve well-established rules of decision that are readily determined, for which certification is not needed. All Petitioner suggests is that certification, where available under state law, should presumptively be used by federal courts of appeals to aid them in deciding important issues of state law that have not been resolved by the state courts, and the use of terminology like "guess" and "predict" in a case is a good indicator of the appropriateness of certification. But judicial discretion not to use the procedure for reasons stated, in particular cases, would survive. Petitioner's position does not in any respect strip federal courts of statutory jurisdiction or encourage them "to abdicate their Article III function" as Respondent says. (Opp. 17). With certification, the federal courts retain jurisdiction while enhancing the quality of their decision-making by getting appropriate input from the state courts.

5. **The court of appeals did not conduct *de novo* review, and Petitioner did not waive her right to appellate review under that standard.** Respondent argues that there is no way to tell whether the court of appeals failed to comply with the requirement for *de novo* review under *Salve Regina College v. Russell*, 499 U.S. 225 (1991). (Opp. 9). But this argument ignores a significant problem in the opinion.

Petitioner asserted an individual claim against Respondent for misrepresentation or breach of duty to her personally — a claim separate and distinct from those asserted on behalf of her deceased husband's estate. This claim was supported, *inter alia*, by Petitioner's uncontested affidavit establishing that she had relied on Respondent's conduct as assurance that her husband did not have a contagious disease, while in fact Respondent knew that he had the deadly, sexually-transmitted AIDS virus. The district court granted summary judgment dismissing Petitioner's personal claim, but its memorandum opinion did not attempt to analyze that claim or explain why those facts could not be sufficient to establish liability under Mississippi law.

Thus when the court of appeals affirmed, there was no stated rationale for it to adopt regarding the supposed legal insufficiency of Petitioner's personal claim. The court of appeals could not possibly have found "that the district court's analytical sophistication and research have exhausted the state law inquiry" on that issue, because the personal claim was not discussed at all. See *Salve Regina* at 232-33. The obvious inference is that the court of appeals did not focus on Petitioner's claim any more than the district court had. Respondent's repeated assertions that the opinion

addressed "each and every claim made by Petitioner" (Opp. 10) do not make it so.

Respondent also argues that, because Petitioner failed to mention the standard of review issue in her suggestion for rehearing *en banc*, she is barred from complaining now that the court of appeals applied the wrong standard. But it is conceded that Petitioner's appeal brief specified *de novo* review as the applicable standard. (Opp. 9). The two decisions on which Respondent relies for this point, *Youakim v. Miller*, 425 U.S. 231 (1976), and *FTC v. Grolier, Inc.*, 462 U.S. 19, 23 n.6 (1983), do not support its argument. Each case deals with points of law **never** raised below. Neither case indicates that a point timely asserted below must be reasserted in a suggestion for rehearing after the court of appeals has acted.

6. **Any misrepresentations of the record have come from Respondent, not Petitioner**. In its opposition brief Respondent alleges that Petitioner has made "many misrepresentations" of the record. (Opp. 3). That is simply not so. In fact, the factual background set out in the Petition is generally taken from the opinion below (A4-A7), and the only misstatements of the record are those made by Respondent.

Respondent, for example, indignantly denies receiving letters from Petitioner's late husband requesting his medical test results until shortly before his death in 1991. (Opp. 4, n.2). But, according to the district court, Respondent chose as a matter of litigation strategy not to dispute that the repeated earlier requests were made. (A6). Additionally, Petitioner's uncontroverted affidavit in the district court established that Respondent's home office confirmed to her in 1988 that it

had received her husband's request and was processing it. Respondent likewise now denies that the HIV test results were received by its medical director, Dr. Stewart (Opp. 4, n.1), but the district court found that "on April 21, 1988, the laboratory sent a telecopy of the [test] results to Dr. Lewis L. Stewart, Jr., JNL's medical director." (A5). The insurance company's flat denial that the couple was trying to conceive a child (Opp. 5, n.4) is both callous and false. Respondent well knows that it demanded and received extensive medical records from Petitioner, documenting her numerous miscarriages as well as treatment by infertility specialists over a period of many years up to the time that she learned of her husband's infection in 1989. Respondent further asserts that "the record does not support" the point that Petitioner's husband did not engage in activities exposing him to the risk of AIDS. This is another misrepresentation by Respondent, which ***itself*** introduced medical records into the summary judgment record, establishing that the deceased husband was not involved in HIV risk activities. See Exh. G, Index of Exhibits filed by Defendant JNL, Dist. Court Dkt. # 48.

Respondent charges that "Petitioner fails to note" that the Rules and Regulations Governing Reportable Diseases of the Mississippi State Department of Health "only apply to physicians within the State of Mississippi." (Opp. 5). This assertion, however, is refuted by the State of Mississippi itself, which quotes the pertinent Health Department regulation as follows:

> Each physician, including each pathologist, dentist, and nurse, **as well as the superintendent, administrator, or other person in charge of any hospital, institution, school or day care center**

> shall report to the State Department of Health any case or suspected case of communicable disease or reportable disease, including those hereinafter listed, which he is attending, has examined, or of which he has knowledge. . . .

Mississippi Amicus Br., 4-5 (emphasis added). The text of the regulation in fact makes clear that several important issues of Mississippi law and the proper construction of the Mississippi public health regulations are raised in this case: whether the regulation on its face applies — as respondent claims — "only" to physicians in Mississippi; whether a life insurance company that obtains and uses blood tests and other medical procedures in the regular course of business, in order to ascertain the existence of communicable diseases such as HIV infection, is an "institution" or otherwise covered by the regulation; and whether the fact that a company is headquartered outside the state, while actively engaging in business in Mississippi, shields it from application of the State Health Department regulation. The State's *amicus* brief forcefully points out that questions of the proper interpretation and application of its health regulations and statutes should be reserved to the Mississippi Supreme Court "[b]ecause of the compelling state interest in adequate, timely reporting of information regarding communicable diseases.... It is simply inappropriate for a federal court, sitting as a result of jurisdiction based on diversity, to decide public policy matters of such importance." *Id.*, 6.

Finally Respondent asserts that, because HIV testing of Petitioner has proved negative, "there is no realistic chance" that she was infected by her husband. (Opp. 5-6). Apart from the fact that this assertion is irrelevant to the Petition and

pertains only to the issue of damages, not to liability, the underwriting manual used by Respondent (which is in the record) states that some persons who are infected "may never develop HIV antibodies and remain seronegative" even though they have the disease. Dep. Exh. 28, Mercantile & General Reinsurance Life Underwriting Manual at 22-4, Dist. Court Dkt. # 39, Itemization of Facts Appendix, Tab 27.

Respondent's misbegotten efforts to divert and mislead this Court, by pretending that Petitioner's factual statements about the case are incorrect, create no reason to overlook the important prudential issues of judicial administration and federalism raised in the petition.

7. **Respondent's professed concern over the docket of the Mississippi Supreme Court is misplaced**. Respondent refers in several places to the backlog of the Mississippi Supreme Court (*e.g.*, Opp. 29), but the State itself has raised no such concern in its *amicus* brief. Moreover, the report of the Administrator of the Mississippi Supreme Court, attached as an appendix to Respondent's brief, indicates that the court's backlog of appellate cases has been significantly reduced and is expected to disappear in the near future. S. Kirchmayr, "Reducing the Appellate Backlog," Mississippi Judicial College News, Vol VII, No. 3 (Winter 1996).

CONCLUSION

The Court should issue a writ of certiorari as requested, and upon review should vacate the decision of the court of appeals and remand the case with instructions to certify the state law issues to the Supreme Court of Mississippi pursuant to Rule 20 of the Mississippi Rules of Appellate Procedure.

Respectfully submitted,

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Dated: January 28, 1997